Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

5 WEST 14TH OWNERS CORP.,

Cross-Petitioner,

vs.

WEST 14TH STREET COMMERCIAL CORP.,
WEST 14TH STREET GARAGE CORP., and
WEST 14TH STREET LAUNDRY CORP.,

Cross-Respondents.

CROSS PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

I. In applying the provisions of 15 U.S.C. Section 3607 to the subject contracts, did the Court of Appeals for the Second Circuit utilize more restrictive standards than are set forth in the statute and thereby defeat the legislative purpose of providing a means of terminating long-term self dealing contractual arrangements without resort to judicial action?

II. Did the Court of Appeals fail to consider the economic realities of the subject transaction, and, in so doing, erroneously decline to find the master commercial lease to be a management contract?

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceedings below were cross-respondents West 14th Street Commercial Corp. ("Commercial Corp."), West 14th Street Garage Corp. ("Garage Corp."), West 14th Street Laundry Corp. ("Laundry Corp.") and cross-petitioner 5 West 14th Owners Corp. (the "cooperative" or "Owners Corp.").

Cross-petitioner 5 West 14th Owners Corp. has no parent companies, subsidiaries or affiliates to list pursuant to Rule 28.1.

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Cross-petitioner, 5 West 14th Owners Corp., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, entered in the within proceeding on March 18, 1987, in the event this Court grants cross-respondents' request for such a writ of certiorari (hereinafter referred to as the "Main Petition").

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 815 F.2d 188 (App. A, to Main Petition, 1a-25a). The decision of the United States District Court for the Southern District of New York (Knapp, D.J.) is reported at 625 F.Supp. 934 (App. B, to Main Petition, 26a-42a).

JURISDICTION

Invoking federal jurisdiction under 15 U.S.C. Secton 3612 and 28 U.S.C. Section 1331, cross-respondents brought suit in the United States District Court for the Southern District of New York for declaratory and injunctive relief. On January 13, 1986, that court granted cross-respondents' motion for summary judgment on their first claim for relief.

On cross-petitioner's appeal, the Second Circuit entered a judgment and opinion affirming the District Court's judgment in part, reversing it in part and remanding the case solely for the purpose of entry of judgment. No petition for rehearing was sought. The jurisdiction of this Court to review the judgment is invoked under 28 U.S.C. Section 1254(1). On the issue of the finality of the Second Circuit's judgment, cross-petitioner relies upon *Chicago v. Atcheson Topeka and Sante Fe Railroad Co.*, 357 U.S. 77 (1958).

On June 16, 1987 cross-petitioner received a copy of the Main Petition to this Court for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit in the case of *West 14th Street Commercial Corp., West 14th Street Garage Corp., and West 14th Street Laundry Corp.*, Petitioners v. *5 West 14th Owners Corp.*, Respondent, bearing No. 86-1990. This cross-petition is respectfully submitted in response thereto and cross-petitioner relies upon the Appendix to the Main Petition.

STATUTE INVOLVED

The statute involved is 15 U.S.C. § 3607, which is part of the Condominium and Cooperative Abuse Relief Act of 1980 (the "Abuse Relief Act") (15 U.S.C. §§ 3601-16):

§ 3607. Termination of self-dealing contracts

Operation, maintenance, and management contracts; penalty

(a) Any contract or portion thereof which is entered into after October 8, 1980, and which –

(1) provides for operation, maintenance, or management of a condominium or cooperative association in a conversion project, or of property serving the condominium or cooperative unit owners in such project;

(2) is between such unit owners or such association and the developer or an affiliate of the developer;

(3) was entered into while such association was controlled by the developer through special developer control or because the developer held a majority of the votes in such association; and

(4) is for a period of more than three years, including any automatic renewal provisions which are exercisable at the sole option of the developer or an affiliate of the developer,

may be terminated without penalty by such unit owners or such association.

Time of Termination

(b) Any termination under this section may occur only during the two-year period beginning on the date on which —

(1) special developer control over the association is terminated; or

(2) the developer owns 25 per centum or less of the units in the conversion project, whichever occurs first.

Vote of owners of units

(c) A termination under this section shall be by a vote of owners of not less than two-thirds of the units other than the units owned by the developer or an affiliate of the developer.

Effective date of termination

(d) Following the unit owners' vote, the termination shall be effective ninety days after hand delivering notice or mailing notice by prepaid United States mail to the parties to the contract.

STATEMENT OF THE CASE

In 1982 Parker 14th Associates (the "developer") decided to sell its apartment building located at 5-19 West 14th Street, New York, New York. (A 3a)* Rather than offer its building in the open market, the developer created the Owners Corp. as a cooperative corporation to be its own controlled purchaser of this property (A 28a) and caused the Owners Corp. to enter into a contract of sale of said property. (JA 508-529)** In order to provide Owners Corp. with the funds which the developer wished to receive from the sale of the building, the developer prepared and filed an Offering Plan under New York State law to permit it to sell Owners Corp.'s stock to the public. (JA 85-128) The developer provided in the Offering Plan that it had the right to direct Owners Corp. to amend any and all portions of Owners Corp.'s Offering Plan in any way it wished, including the right to abandon the Offering Plan in its entirety prior to it being declared effective. (JA 93,127) The developer also created the cross-respondents for the purpose of securing to itself certain contracts with Owners Corp. which would permit it to retain, for up to forty years, the income from three revenue generating assets it was to sell to Owners Corp.: the laundry room, the parking garage and the four commercial stores located in the building. (A 280, 3a-6a; JA 117-123) Thereafter, and on September 6, 1984, the developer sold the apartment building to Owners Corp. and caused Owners Corp. to execute the three self dealing contracts with the developer's affiliates, the cross-respondents herein. (JA 250, 255-317) Of particular relevance to this cross-petition is the contract between Owners Corp. and Commercial Corp. whereby Commercial Corp. was granted the right to rent and re-rent the four commercial stores located in the building in its own name. (JA 301-317) This contract, in the form of a lease, was for a period of twenty years, with

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* Citations in the form "A ____" refer to the pages in the Appendix to the Main Petition.

** Citations in the form "JA ____" refer to pages in the Joint Appendix in the Court of Appeals.

a twenty year option to renew, at admittedly below market values, and, as stated by the Court of Appeals, provided Commercial Corp. with an opportunity to sub-let the property at substantial profit. (A 5a)

Owners Corp., once free of the developer's dominion and control, held a shareholder's meeting on June 12, 1985 at which time more than 80% of the eligible shareholders voted to terminate the developer's three self dealing contracts pursuant to 15 U.S.C. Section 3607 and Owners Corp. so notified the cross-respondents. (JA 333-344) This litigation ensued.

Cross-respondents brought suit in the United States District Court for the Southern District of New York, *inter alia*, for a declaratory judgment that Owners Corp. had no right to terminate their leases. (JA 4-9) On motion for summary judgment, the District Court granted such relief, finding that the right to terminate these agreements pursuant to 15 U.S.C. Section 3607 was not available to Owners Corp. because the developer had undertaken what was found to be "arms length negotiations" with certain pre-conversion occupying tenants. (A 26a-42a)

On appeal, the United States Court of Appeals for the Second Circuit rejected the reasoning of the District Court and held that the "negotiations" between the developer and the pre-conversion occupying tenants were not relevant to the applicability of 15 U.S.C. Section 3607. (A 23a-25a) Further, the Court of Appeals found that the three agreements were contracts susceptible to the applicability of the federal statute, as they were executed after October 8, 1980, were for more than three years, were entered into between the developer's affiliates and Owners Corp. while there was special developer control over Owners Corp., and, as to the garage and laundry facilities, but not as to the commercial stores, that they provided for the operation, maintenance or mangement of property serving Owners Corp.'s shareholders. The Court of Appeals held that the laundry and garage leases were terminable but that the master lease for the commercial stores was not. (A 15a-23a)

REASONS FOR GRANTING THE WRIT

Owners Corp. respectfully submits, in the event this Court grants the Main Petition for issuance of a writ of certiorari, as sought by the cross-respondents, that this cross petition should be granted in order to present to this Court all of the relevant issues regarding the opinion of the United States Court of Appeals for the Second Circuit which would need to be reviewed so that this Court would be able to provide complete relief to all of the parties herein.

In the event this Court is disposed to grant the Main Petition, then the parties should be permitted to fully brief all relevant issues. While the Main Petition presents two questions to this Court, a third issue exists: The Court of Appeals, while finding the laundry concession agreement and the garage lease to be terminable pursuant to 15 U.S.C. Section 3607, nonetheless applied unduly restrictive definitions of the text of 15 U.S.C. Section 3607(a)(1), and thereby rendered the statute inapplicable to the termination of the master commercial lease. If the Court of Appeals had applied the statute without such additional restrictive language, the laundry and garage contracts would nonetheless remain terminable by reason of the statute, but the master lease for the commercial stores would be properly terminable as well. The use of such restrictive language will hereafter require all terminations of such long-term self dealing arrangements to be resolved by the judicial branch of government. Such a result is in direct contradiction to the stated legislative intent of 15 U.S.C. Section 3607.

I. The Court Of Appeals Utilized Language Not Found In The Statute In Violation Of Its Own Stated Rules Of Statutory Construction

The Court of Appeals cogently understood that a lease is but one form of a contract as it may contain covenants that require the lessee to perform contractual services for the landlord. (A 18a) Furthermore, the Court of Appeals appreciated the fact that the master commercial lease was such a contract. (A 19A)

The Court of Appeals, however, refused to hold that the master commercial lease was terminable pursuant to 15 U.S.C. Section 3607 by introducing two concepts not set forth in the statute or otherwise indicated by its legislative history: (1) that the property must provide a service *primarily* for the benefit of the unit owners, (A 20a) and, (2) that the services must be of *the sort that a tenant should reasonably expect as an essential adjunct of an apartment complex.* (A 20a-21a)

The Court of Appeals found the statute inapplicable because the commercial stores were *primarily* for the benefit of the public and not the cooperative unit owners. (A 20a) The Court of Appeals literally added the word "primarily" in its statement of the statute despite the absence of such a concept in the text of Section 3607(a)(1). While elsewhere rejecting the cross-respondents' argument that the property must "exclusively" serve the residents in the building, on the grounds that such words "exclusive" or "exclusively" do not appear in the statute (A 19a), the Court of Appeals erred in nonetheless inserting the word "primarily" which likewise does not appear in the statute.

The Court of Appeals rightly recognized, because no special meaning was attached to the words "property serving", that it would assume that Congress did not contemplate one: thus the words were to be accorded their plain and ordinary meaning. (A 19a) Unfortunately the Court of Appeals did not attribute a plain and ordinary meaning to these words: the Court held that "property *serving*" meant "property *providing services.*" (A 19a) In holding that *serving* meant *providing services*, the Court ignored the plain and ordinary definition of *serving*, as "the action denoted by the verb, 'to serve' " which would permit the application of such meanings as to help, to be of use to, to be favorable, opportune or convenient, to satisfy, to supply, and the like. *See* Webster's *New International Dictionary of the English Language*, Second Edition, Unabridged, 1941. Using the plain and ordinary meaning of the words "property serving", it is clear that contracts concerning the four commercial stores fall within the protection of 15 U.S.C. Section 3607. In failing to honor its own stated stricture, the Court of Appeals improperly restricted the application of Section 3607(a)(1).

Upon the deletion of this restrictive language, there can be no valid dispute that the four commercial stores serve the cooperative unit owners in at least two regards: the stores can and do sell products to be consumed by the residents, and the income received by Owners Corp. from these revenue generating properties can and is used to pay for the maintenance and operation of the building. This income, were it not for the stores, would otherwise be provided directly by the shareholders in their monthly rental/maintenance payments to Owners Corp.

At the same time, while conceding that the stores serve the residents as a "convenience" (A 20a), albeit not primarily serving them, the Court of Appeals nonetheless further restricted the application of the broad remedial provisions of 15 U.S.C. Section 3607 by declaring that the services must be "the sort that a tenant should reasonably expect as an essential adjunct of an apartment complex". (A 20a-21a) No such restrictive language is set forth in the statute nor is there any reference to this concept in the legislative history of 15 U.S.C. Section 3607(a)(1).

A definitional standard based on the expectations of the tenants, or based on the identity of the primary consumers of the services which are or could be provided by the stores, is inimical to the purpose of 15 U.S.C. Section 3607 which the Court of Appeals properly stated was to provide a means by which unit owners may terminate a long-term self dealing contractual arrangement without having to resort to judicial action (A 23a). The Court of Appeals' stated construction of Section 3607 calls for factual determinations in each instance and would hereafter force every termination into litigation. For example, while the Court of Appeals has declared that stores on West 14th Street in Manhattan, New York are not essential adjuncts of an apartment complex, this Court has stated that such stores in Co-op City in the Bronx, New York do make essential services available in that enormous complex. *United Housing Foundation, Inc. v. Forman*, 421 U.S. 837 (1975). Clearly, location of the property is a key determinant, and, therefore, each termination will be subject to litigation. This result was the basis

for the Court of Appeals' rejection of the reasoning of the District Court as to the purported "negotiations defense" of the cross-respondents. (A24a) The Court of Appeals therefore violated its own strictures in establishing its own standard of "tenant expectation" and "primary" services not found in the language of the statute.

II. The Court of Appeals Erred In Not Finding That The Master Commercial Lease Was A Management Contract

Congress, in 15 U.S.C. Section 3607, provided for the non-judicial termination of two kinds of contracts: contracts providing for operation, maintenance or management of a cooperative corporation, and, contracts providing for operation, maintenance or management of property serving the unit owners. The Court of Appeals considered Section 3607(a)(1) as dealing only with the second type of contract and dealt exclusively with the question of whether the subject of said contract was "property serving" the unit owners of Owners Corp. Upon a proper reading of the statute, however, and entirely separate and apart from "property serving the unit owners", the master commercial lease would be subject to termination as it granted Commercial Corp. the right to perform certain corporate functions as though it were Owners Corp. or its designated agent.

The key question to a proper analysis of this type of contract is whether the rights and responsibilities transferred by the developer to Commercial Corp. were the inherent corporate rights and obligations of Owners Corp.. This question must be answered in the affirmative. With regard to the four stores, the underlying transaction effectively carved out the operation, maintenance and management functions of Owners Corp. and transferred said functions to Commercial Corp. for the economic benefit of the developer.

Owners Corp., upon receiving title to the property, would have itself become obligated to operate, maintain and manage the four stores as one of its inherent corporate activities. There is no dispute in the record that neither Owners Corp. nor Commercial Corp. ever intended to physically occupy any of the

four stores for their own use. As a physical asset, and forming a part of the physical premises owned by Owners Corp., the four commercial stores solely constituted a corporate business opportunity to Owners Corp. to receive rental income upon leasing those stores to third parties. In the same regard, and as a result of the master commercial lease, Commercial Corp. was granted Owner Corp.'s right to be in the business of renting and re-renting said stores to third parties: the master commercial lease granted Commercial Corp. the right to sublet the whole or any part or parts of the Demised Premises without the need to obtain Owners Corp.'s permission, as well as the absolute right to assign its entire interest in said lease, which, upon its assumption by the assignee, would relieve Commercial Corp. from all of its subsequent obligations under said lease. (JA 308) In reality, the master commercial lease merely served as a vehicle to transfer this corporate right from Owners Corp. to Commercial Corp.. All other aspects of the transaction were secondary conditions designed by the developer. For example, there was no economic risk to Commercial Corp., in being called a tenant rather than being called a managing agent, as the rent Commercial Corp. was to pay Owners Corp. was concededly below market value: the profit was "built into" the transaction by the developer which thus removed the element of risk commonly present in a landlord-tenant relationship. This transfer of functions, normal and acceptable in arms length transactions, becomes the proscribed statutory activity when, as here, it is the result of the developer's self-dealing.

There can be no dispute that a managing agent's contract regarding the 429 residential units could be terminable pursuant to the statute as it transfers an inherent corporate function of Owners Corp.. There is no significant difference if the subject matter of the contract is 429 residential apartments or four stores. In both situations Owners Corp. would be divested of corporate functions it would otherwise undertake in its own name.

In its review of the subject contracts, the Court of Appeals failed to properly honor the repeated admonitions of this Court to disregard form in favor of substance, and to emphasize the

"economic realities" underlying the transaction and not the name appended thereto. *United Housing Foundation, Inc. v. Forman*, 421 U.S. 837, 849 (1975); *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967); *Securities and Exchange Commission v. W.J. Howey Company*, 328 U.S. 293 (1945); *Securities and Exchange Commission v. C.M. Joiner Leasing Corp.*, 320 U.S. 344 (1943).

The Court of Appeals failed to acknowledge that the master commercial lease, in terms of economic reality, was a management contract. Commercial Corp. was to effectively function as a commercial renting broker for these four stores, except that it could keep all of the rental income and profit it received, less the fixed sums set forth in the master commercial lease to be paid to Owners Corp.. In terms of economic reality, the master commercial lease was a management contract and the failure of the Court of Appeals to so find constituted error.

CONCLUSION

For the foregoing reasons, cross-petitioner respectfully submits that this writ should be granted if this Court is disposed to grant the cross-respondents' request for a writ of certiorari.

Respectfully submitted,

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